IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.707 OF 1997

In

NOTICE OF MOTION NO.1979 OF 1993

In

SUIT NO.3087 OF 1993

Kishore Vishindas Bachani of Bombay,
Indian Inhabitant, residing at
27, Nibbana, Pali Hill, Bandra,
Bombay--400 050. : Appellant
(Orig.Plaintiff)

V/s.

1. Sushil Mulkaraj Malhotra of Bombay,
   Indian Inhabitant, presently
   residing at 10, Half Moon Lane,
   Irvington, New York-10533, U.S.A.
2. Famous Communications Pvt. Ltd., a
   company incorporated under the
   provisions of the Companies Act,
   1956 having its registered office
   at 56, White Hall Building,
   Near Shalimar Hotel, Kemps Corner,
   Bombay--400 026.
3. Roger Pereira Communications Pvt.

Ltd., a company duly incorporated under the provisions of the Companies Act, 1956 having its address at White Hall Building, Kemps Corner, Bombay-400 026.

4. Laxmi Sushil Malhotra, presently residing at 10, Half Moon Lane, Irvington, New York-10533, U.S.A. : Respondents

(Orig.Defendants)

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Mr.Simil Purohit i/b. M/s.Dhru & Co., for the appellant.

Mr.M.P.S.Rao i/b. M/s.Udwadia, Udeshi, Desai, Berjis & Chinoy for respondent no.3.

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CORAM : R.M.LODHA & S.A.BOBDE,JJ.

DATE : NOVEMBER 8, 2006.

ORAL JUDGEMENT (Per R.M.Lodha,J.)

1. This appeal has been preferred by the original plaintiff against the part of the order dated 19.6.1997 whereby the learned Motion Judge declined to appoint Court Receiver in respect of the property being Block no.56, White Hall, Kemps Corner, Mumbai.

2. According to the plaintiff (appellant herein), he formed a partnership firm in the name of M/s.F & D

Merchandising with the 1st defendant (respondent no.1). The said firm was duly registered with the Registrar of Firms. The management of the firm was looked after by the 1st defendant. The plaintiff's case is that the property being Block no.56, White Hall, Kemps Corner, Mumbai, was acquired by the registered firm M/s.F & D Merchandising in which he was one of the partners. The allegation is that the 1st defendant, who was in the management of the firm, wrongfully utilised the assets, properties and goodwill of the said firm; constituted another firm in the name and style of M/s.F & D Merchandising along with his wife (respondent no.4 - defendant no.4) and transferred the same in favour of Roger Pereira Communications Pvt. Ltd. (respondent no.3 - defendant no.3) purporting to be belonging to the second firm in which the defendant no.1 and the defendant no.4 claim to be partners and thereby depriving the plaintiff of the said property as partner in the firm M/s.F & D Merchandising. That led the plaintiff to file the suit before this Court on 25.8.1993, inter alia, praying for dissolution of the firm, accounts and for a declaration that the 1st defendant and/or the 4th defendant in their alleged capacities as partners of the alleged firm M/s.F & D Merchandising have no right, title, interest or share in the said business premises and also for a declaration that the defendant no.3 has not acquired any right, title or interest or share in the suit

premises.

3. Notice of Motion was taken out by the plaintiff for appointment of Court Receiver in respect of the assets, properties, business, books of account, Bank account, stock-in-trade and other properties of M/s.F & D Merchandising, being the registered firm.

4. The defendant nos.1 and 4 do not seem to have contested the Notice of Motion. However, the defendant no.3, the purchaser of the subject premises, contested the Notice of Motion and set up the case that they are lawful owners of the subject premises. The shares in that property have been transferred and registered by the co-operative society in their favour in the year 1993 itself.

5. The learned Motion Judge, after hearing the plaintiff and the defendant no.3, ordered the appointment of the Court Receiver in respect of all assets, properties, business, books of accounts, Bank account, paper, bills, vouchers, stock in trade and all other properties of M/s.F & D Merchandising, being the registered firm, but refused to appoint the Court Receiver in respect of the subject premises. Aggrieved by the non-appointment of the Court Receiver in respect of the subject premises, the appeal

has been preferred by the plaintiff.

6. The counsel for the plaintiff strongly relied upon the agreement dated 3.4.1987 entered into between Bomanji Jamasji Mistry Pvt. Ltd. and M/s.F & D Merchandising, the registered partnership firm carrying on business at 2A, Elphinstone House, 17, Murzban Road, Opp. Sterling Cinema, Mumbai, in support of the plaintiff's case that the property was acquired by the registered firm M/s.F & D Merchandising in which the plaintiff was one of the partners along with the defendant no.1 and not by another unregistered firm by the same name M/s.F & D Merchandising in which the defendant nos.1 and no.4 claim to be the partners. On the other hand, the counsel for the defendant no.3 placed reliance upon the share certificate dated 1.9.1989 pertaining to the subject premises issued by The White Hall Premises Co-operative Housing Society Ltd. in favour of M/s.F & D Merchandising and the endorsement of transfer of shares dated 17.4.1993 in favour of the defendant no.3. The defendant no.3 has also relied upon the Memorandum of Agreement dated 26.2.1993 entered into between M/s.F & D Merchandising, the firm in which the defendant nos.1 and 4 are partners, and the defendant no.3, in addition to the no objection given by the income-tax authorities for the purchase of the said property by the defendant no.3 from M/s.F & D

Merchandising under section 269-UL of the Income-tax Act, 1961.

7. It is true that in the firm M/s.F & D Merchandising which is a registered partnership firm, carrying on business at 2A, Elphinstone House, 17, Murzban Road, Opp. Sterling Cinema, Mumbai, the plaintiff is one of the partners, the other partner being the 1st defendant. This is clear from the Partnership Deed dated 30.1.1985. The plaintiff has 60% share in the said partnership while the defendant no.1 has 40% share. It is also true that the agreement dated 3.4.1987 records the said agreement is being between Bomanji Jamasji Mistry Pvt. Ltd. and M/s.F & D Merchandising, registered partnership firm carrying on business at 2A, Elphinstone House, 17, Murzban Road, Opp. Sterling Cinema, Mumbai. The question is: can on the basis of the said agreement dated 3.4.1987 it be held that the subject premises were acquired by the registered firm M/s.F & D Merchandising in which the plaintiff is a partner? We asked the counsel for the plaintiff to show us any material indicating that consideration for the acquisition of the subject premises was paid by the registered firm - M/s.F & D Merchandising in which the plaintiff claims to be one of the partners. The counsel fairly submitted that the plaintiff did not possess any document which could show that the consideration for the

acquisition of the said property was paid by the registered firm -- M/s.F & D Merchandising -- in which the plaintiff is a partner. He would submit that the account was being managed by the defendant no.1 and that account books, etc., were in possession of the 1st defendant. Then we asked the counsel for the plaintiff as to whether in this background, any application was made before the trial Judge for inspection of the accounts books of the firm in which the plaintiff claims to be the partner to which he answered in the negative. Moreover and most curiously, as far back as on 19.6.1997, by the impugned order, the learned Motion Judge appointed the Court Receiver in respect of all assets, properties, business, books of accounts, Bank account, stock in trade, etc., and it is a fact that pursuant thereto, the Court Receiver formally took charge of all assets, properties, business, books of accounts, Bank account, etc. But for the last nine years, no effort has been made by the plaintiff to get the books of accounts and Bank account, etc. inspected from the office of the Court Receiver to find out as to whether any consideration was paid by the firm M/s.F & D Merchandising in which the plaintiff claims to be the partner.

8. On the other hand, the share certificate dated 1.9.1989 and the endorsement made thereon about the

transfer of the said share certificate in favour of the present defendant no.3 from the firm M/s.F & D Merchandising in which the defendant nos.1 and 4 are partners, prima facie supports the case of the defendant no.3 that the subject premises were acquired by the defendant no.3 from M/s.F & D Merchandising who held the shares of the suit premises from the concerned co-operative society.

9. Taking all these facts into consideration, prima facie, it cannot be said that the plaintiff was able to show that the subject premises being Block no.56, White Hall, Kemps Corner, Mumbai, belonged to the firm in which the plaintiff claims to be the partner.

10. We find ourselves in agreement with the finding recorded by the learned Motion Judge that, prima facie, there is nothing to indicate that the subject premises constitute the property of the registered firm M/s.F & D Merchandising.

11. There is no merit in the appeal and, therefore, it is dismissed with no order as to costs. The ad-interim order of status quo stands vacated.

12. The oral prayer for continuation of the order of

status quo is rejected.

Sd/-

R.M. LODHA, J.

Sd/-

S.A. BOBDE, J.